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In the Supreme Court of the United States

OCTOBER TERM, 1977

BARRY WILLIAM WEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, Jr.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
HOWARD WEINTRAUB,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-4 to A-11) is reported at 562 F. 2d 375. The order of the district court (Pet. App. A-1 to A-3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1977, and a petition for rehearing with suggestion of rehearing *en banc* was denied on October 6, 1977. The petition for a writ of certiorari was not filed until November 7, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

256-310—78

QUESTIONS PRESENTED

1. Whether the court of appeals' affirmance of petitioner's conviction under 18 U.S.C. 659, rather than under 18 U.S.C. 922(j) as the indictment had charged, violated petitioner's Fifth Amendment right to be indicted by a grand jury.

2. Whether petitioner's conviction for receiving stolen firearms is contrary to the decision in *Milanovich* v. *United States,* 365 U.S. 551.

STATEMENT

Following a non-jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of one count of receiving and storing two firearms shipped in interstate commerce, which he knew or had reasonable cause to believe were stolen, in violation of 18 U.S.C. 922(j).[1] He was sentenced to a probationary term of three years. On appeal the court of appeals held "that the language of the indictment and the undisputed facts at the trial support a conviction under 18 U.S.C. § 659,[2] but not

[1] In pertinent part, 18 U.S.C. 922(j) provides:

> It shall be unlawful for any person to receive, conceal [or] store * * * any stolen firearm * * * which is moving as, which is a part of, or which constitutes, interstate or foreign commerce, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

[2] In pertinent part, 18 U.S.C. 659 provides:

> Whoever * * * steals * * * from any motortruck, or other vehicle, or from any * * * storage facility, station, station house, platform or depot * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

under § 922(j)" (Pet App. A–9). Being "unable to ascertain any possible prejudice to the defendant" from what it perceived to be an "error in the indictment" (Pet. App. A–10),[3] the court of appeals affirmed the conviction (Pet. App. A–9), but remanded for modification of the judgment to reflect a misdemeanor conviction under 18 U.S.C. 659 instead of a felony conviction under 18 U.S.C. 922(j) (Pet. App. A–11).

The evidence at trial is not in dispute. It showed that petitioner, while he was working at United Parcel Service in Nashville, Tennessee, stole two firearms from an interstate shipment of weapons en route from Rossville, Georgia, to Santa Fe, Tennessee. Petitioner brought the two firearms to his home in Tennessee and retained possession of them until he

[3] The indictment charged:

> On or about January 2, 1976, in the Middle District of Tennessee, BARRY WILLIAM WEST knowingly did receive, conceal and store stolen firearms, that is, a Smith and Wesson .38 caliber revolver, Model 60, Serial No. R89979 and a Browning pistol, .380 caliber, Serial No. 70N01435, which were then moving as and were a part of the constituted interstate commerce from Rossville, Georgia, to Sante Fe, Tennessee knowing and having reasonable cause to believe that the firearms were stolen.
>
> In violation of Title 18, United States Code, Section 922(j).

surrendered them to an agent of the Bureau of Alcohol, Tobacco and Firearms on March 17, 1976. On that date, petitioner also readily confessed to his commission of the theft (Tr. 9–13, 15).

ARGUMENT

1. Petitioner contends (Pet. 6–8) that the indictment under which he was prosecuted did not charge a violation of 18 U.S.C. 659 and thus that the court of appeals' affirmance of his conviction under that statute violated his Fifth Amendment right to be prosecuted by a grand jury indictment. The question whether the indictment in this case contains a sufficiently complete statement of the facts to charge an offense under 18 U.S.C. 659 raises an interesting theoretical issue.[4] But the Court need not address the question in this case; it is not of such general or recurring importance that it warrants review by the Court, and the court of appeals' disposition of the question, even if incorrect, does no injustice in this case.

[4] There is presently a conflict among the circuits on the question whether an indictment charging an offense under 18 U.S.C. 659 must specify the place from which the goods were stolen (the indictment in this case does not so specify). Compare *United States* v. *Manuszak*, 234 F. 2d 421 (C.A. 3) (holding that the place must be specified), with *United States* v. *Wora*, 246 F. 2d 283 (C.A. 2); *United States* v. *Spivey*, 448 F. 2d 390 (C.A. 4); *Dunson* v. *United States*, 404 F. 2d 447 (C.A. 9), certiorari denied, 393 U.S. 1111 (holding that the place need not be specified). The courts that hold that the place need not be specified in the indictment have, we believe, the better view: " 'Since § 659 enumerated practically all the instruments of interstate commerce, * * * the indictment would naturally be understood as charging that the theft was from one of the enumerated facilities,' [and] accordingly, the failure to specify the facility, did not represent 'a complete omission' of an essential element of the offense * * *" (*United States* v. *Spivey*, *supra*, 448 F. 2d at 391, quoting from *United States* v. *Wora*, *supra*).

a. The undisputed evidence at trial, which includes a stipulation of facts and a confession by petitioner,[5] shows beyond any doubt that petitioner committed an offense under 18 U.S.C. 659. Petitioner does not deny this; indeed, at trial he acknowledged through counsel that "he ha[d] admitted the commission of a criminal offense * * * (Tr. 16). There is no question that this "criminal offense" arises from the same incident for which petitioner was indicted.

Moreover, the indictment and original conviction were for a felony, but petitioner succeeded in the court of appeals in reducing the gravity of his offense to a misdemeanor (because the evidence at trial did not show the value of the firearms to be more than $100 (see Pet. App. A–11; 18 U.S.C. 659)).[6]

Under these circumstances, it is not clear what petitioner hopes to gain by a reversal of his conviction in this Court. If petitioner succeeds, the United States Attorney then would be free to seek a felony

[5] We are lodging copies of the stipulation and the trial transcript with the Clerk of this Court.

[6] Since the offense for which petitioner now stands convicted is a misdemeanor and therefore could have been charged by information instead of by indictment (see Fed. R. Crim. P. 7(a)), it is difficult to see how the court of appeals' decision (even if wrong in its premise that the indictment fairly charged an offense under 18 U.S.C. 659) deprived petitioner of his Fifth Amendment right to indictment by a grand jury.

conviction under 18 U.S.C. 659, and the undisputed evidence in the present case shows that there would likely be little difficulty in succeeding in such a prosecution.[7] Petitioner (who is now on probation for a misdemeanor conviction) thus is not likely to fare better and may fare much worse if his conviction is reversed.

b. Moreover, we believe, contrary to the court of appeals, that petitioner was properly indicted and convicted under 18 U.S.C. 922(j). That statute does not necessarily require "that the weapon be stolen at the time it crosses state lines" (Pet. App. A–6).[8] The only requirement is that the gun "have a contemporaneous connection with commerce at the time of the offense" (*Scarborough* v. *United States,* 431 U.S. 563, 570; cf. *Barrett* v. *United States,* 423 U.S. 212, 217).[9] The issue thus is not whether the gun was stolen before or after crossing state lines but whether "the gun

[7] The record does not reflect the value of the firearms, but we are informed by the United States Attorney's office that the firearms together have a value well in excess of $100 and therefore that petitioner would be prosecutable as a felon under 18 U.S.C. 659.

[8] Such a requirement is contained in 18 U.S.C. 922(i), which makes it unlawful for any person "to transport or ship in interstate or foreign commerce, any stolen firearm * * *." See also 18 U.S.C. 2312 (similar prohibition with respect to stolen vehicles); *United States* v. *Albuquerque*, 538 F. 2d 277, 278 (C.A. 9) (construing 18 U.S.C. 2312); *United States* v. *Johnson*, 526 F. 2d 600, 601 (C.A. 8) (same); *United States* v. *Wyatt*, 437 F. 2d 1168, 1171–1172 (C.A. 7) (same). But 18 U.S.C. 922(i) and 2312 are worded substantially differently from 18 U.S.C. 922(j).

[9] See also 18 U.S.C. 2313 (Dyer Act provision parallel to 18 U.S.C. 922(j)); *United States* v. *Browning*, 439 F. 2d 813, 815 (C.A. 1) ("[I]n a prosecution under 18 U.S.C. 2313 the government must show (1) that the motor vehicle was stolen; (2) that the defendant sold it knowing it was stolen; and (3) that the motor vehicle was moving as or was a part of the interstate commerce at the time it was sold."). Contrary to the court of appeals' view here (Pet. App. A–6 to A–8), 18 U.S.C. 2313 does not invariably require that the vehicle be stolen before it crosses state lines (compare 18 U.S.C. 2312 (see note 8, *supra*)), although ordinarily that is the factual basis upon which a violation of 18 U.S.C. 2313 rests. (This is so because the theft usually is of a vehicle that is not moving in interstate commerce at the time, and consequently a subsequent transportation of it across state lines must be shown to establish the required nexus.) However, the receipt or concealment of (for example) a new automobile stolen from a shipment of automobiles en route from the factory in Michigan to a dealer in Tennessee would be covered by 18 U.S.C. 2313, even if the theft and receipt both occurred in the latter state.

was still moving or was still part of interstate commerce at the time [petitioner] concealed it" (*United States* v. *Ruffin,* 490 F. 2d 557, 561 (C.A. 8)).

The evidence in this case shows such a "contemporaneous connection with commerce." While manning a conveyor belt at the United Parcel Service depot in Nashville, Tennessee, petitioner stole (and at the same time concealed) two firearms that were part of a larger shipment travelling from Georgia to Santa Fe, Tennessee. Although the theft and concealment of the firearms thus occurred in one state, on these facts it is plain that the firearms "[were] still moving [and were] still part of interstate commerce at the time

* * *" (*United States* v. *Ruffin, supra*), within the meaning of 18 U.S.C. 922(j).[10]

2. Petitioner also contends (Pet. 8–9) that under the holding in *Milanovich* v. *United States,* 365 U.S. 551, a person such as himself who is charged with receipt or possession of stolen property cannot be convicted on evidence that he was the thief. But, as the court of appeals correctly pointed out (Pet. App. A–11), *Milanovich* stands only for the proposition that Congress will not be deemed to have authorized convictions and cumulative punishments for both the theft and possession (or receipt) of goods in the absence of a clear indication that that was intended.

[10] Our reading of 18 U.S.C. 922(j) is supported by its legislative history. The predecessor statute of 18 U.S.C. 922(j) (75 Stat. 757; see 52 Stat. 1250, 1251) plainly covered the situation here, *i.e.*, the receipt, concealment, etc. of a firearm "moving in or which is a part of interstate * * * commerce, and which while so moving * * * has been stolen * * *." The amendment of the statute to its present form, moreover, was intended to clarify and (if anything) to broaden, not narrow, its coverage. In explaining the new language the Commissioner of the Internal Revenue Service stated (Hearing on S. 1592, S. 14, S. 1180 and S. 1965 before the Subcommittee to Investigate Juvenile Delinquency of the House Committee on the Judiciary, 89th Cong., 1st Sess. 81 (1965)): "This change will make it clear that the provisions apply to stolen firearms * * * transported in interstate or foreign commerce after having been stolen, as well as to firearms and ammunition stolen in the course of movement in interstate or foreign commerce."

The proposed amendment was enacted into law as Section 922(h) of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 225, 231, and was amended in minor part (including redesignation as Section 922 (j)) by the Gun Control Act of 1968, Pub. L. 90–618, 82 Stat. 1213, 1221.

See also *Heflin* v. *United States,* 358 U.S. 415; *Prince* v. *United States,* 352 U.S. 322. The present case does not implicate that rule. Petitioner was tried on a single count charging that he "did receive, conceal and store stolen firearms"; he was not charged with or convicted of the theft itself. Under these circumstances, petitioner's conviction is proper, even though it is based in part on evidence of his participation in the theft. See *United States* v. *Trzcinski,* 553 F. 2d 851 (C.A. 3), certioriari denied, 431 U.S. 919; *Phillips* v. *United States,* 538 F. 2d 586, certiorari denied, 429 U.S. 1024; *United States* v. *Dixon* 507 F. 2d 683 (C.A. 8), certiorari denied, 424 U.S. 976; cf. *Gaddis* v. *United States,* 424 U.S. 544, 550 n. 15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BENJAMIN R. CIVILETTI,
Assistant Attorney General.
HOWARD WEINTRAUB,
Attorney.

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